

THE INTERNATIONAL BANK OF BRUNEI BHD.

a

v.

HOCK HIN TRADING CO.

COURT OF APPEAL, BRUNEI DARUSSALAM

TI LIANG YANG J

P. MACDOUGALL

HOOPER

[CIVIL APPEAL NO. 3 OF 1990]

1 DECEMBER 1990

b

CIVIL PROCEDURE: *Garnishee order - Third party claim - Interpleader summons by Acting Chief Registrar - Order set aside - Whether legal assignment - Powers and duties of Acting Chief Registrar - Money remained in Court - Money being held on whose behalf - Bailiff holding money as Court official.*

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Hock Hin Trading Co. the judgment creditors, JC, had obtained judgment against the judgment debtors, M. As a result of non-payment of the judgment debts, JC commenced garnishee proceedings in respect of a debt due to M by the Public Works Department of Brunei, PWD and JC obtained the AG's consent to attach the sum due for payment by PWD to M after which the bailee issued the relevant garnishee notice; the relevant garnishee order (less Crown debts) was subsequently made by the Registrar.

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The claimants, IBB, claimed that they were entitled to a certain portion of the garnished sum as assignee of M for the contract proceeds due to them by the government.

The Acting Chief Registrar, ACR, took out an interpleader summons directing JC and IBB to state the nature and particulars of their respective claims to the money garnished. After hearing the parties, the ACR set aside the garnishee order and ordered for the sum claimed by IBB to be paid to IBB on the ground that the debt had been assigned to them under a legal assignment. JC appealed on the ground that the ACR was not competent to set aside the garnishee order and entertain interpleader proceedings as it was contended that the Court was *functus officio* as the garnishee order was made by the Registrar, whose jurisdiction was co-extensive with that of the ACR.

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Commissioner W held that the ACR had correctly proceeded by way of interpleader summons but allowed the appeal on the basis that there was no assignment and restored the garnishee's order.

IBB now appeals the latter part of W's decision and JC appeals the former part of W's decision.

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Held:

[1] The garnishee and interpleader proceedings were distinctly separate procedures within the same action. As long as the money remained in Court, interpleader proceedings were available to determine the claim of a third party who was not present at and was unaware of the garnishee proceedings. The granting of relief in this case by way of interpleader did not require the setting aside of the garnishee order.

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[2] (a) The words "garnishees do forthwith pay to the Court on behalf of the judgment creditors" used in the Registrar's order mean that the money should be paid to the Court, which would then hold the money on account of JC;

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- a** (b) the Court, in the person of the bailiff, did not then surrender his power and duties and become JC's alter ego - he still had the power and was under a duty to make such deductions as were necessary for Court expenses before paying the remainder to JC. He was holding the money as a Court official and not as an agent of JC;
- (c) on notification of IBB's interest, the only proper course for ACR was to take out an interpleader summons.

b [3] The only reasonable inference that can be drawn from the letter dated 22 November 1983 from M to PWD is that M clearly intended to assign to IBB the money due under the contract as:

- (a) the letter embodies a request to the Director of Public Works that he make all payments to the order of the claimants and
- c** (b) the significant documents, namely the actual cheques by which payment was made to IBB and the affidavit of CL, the administrative assistant of IBB which specifies that the payee is IBB and which also made it clear that the consideration for the assignment was IBB's agreement to finance M's contract with PWD.

d [4] On the facts, there is no conduct on IBB's part which could properly be construed as waiver.

[Appeal allowed.]

Cases referred to;

- Behn Meyer & Co. (M) Sdn. Bhd. v. Agropharm Sdn. Bhd.* [1988] 2 MLJ 636
- Burrell & Sons v. Read* [1894] LT 36
- e** *Hock Hua Bank Bhd. v. Sahari Bin Murid* [1981] 1 MLJ 143
- In Re Fairley* [1922] 2 Ch. 791
- Marshall v. James* [1905] 1 Ch. 432
- Moore v. Peachey* [1892] 66 LT 198
- Randall v. Lithgow* [1881] XII QBD 525
- Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 WLR 761

f **Legislation referred to:**

High Court (Civil Procedure) Rules [Brunei], O. 41 r. 4, O. 43 r. 2(1)

Other source referred to:

- Halsbury's Vol. 16 4th Edn. para. 1471*
- For the appellants - Irene Appaduray; M/s. Shelley Yap & Irene Appaduray*
- g** *For the respondents - Aisha Alkaff; M/s. Ibrahim Chee & Company*

JUDGMENT

Ti Liang Yang J:

- h** Hock Hin Trading Company (hereinafter referred to as the judgment creditors) were the main material suppliers for several government projects undertaken by Sharikat Hj Metussin dan Anak-anak (hereinafter referred to as the judgment debtors). The judgment creditors were owed large sums of money by the judgment debtors. By 1989 the judgment creditors had obtained two judgments against the judgment debtors in this action for a total sum of B\$391,870.55. As the judgment debts were not paid, garnishee proceedings were taken out in respect of a debt due to the judgment debtors by the Public Works Department of the Brunei Government. On 1 August 1989, the Attorney-General granted his consent to the
- i** judgment creditors to attach a sum of B\$121,527.08 being the only sum of money which was

due for payment from the government to the judgment debtors. Following the Attorney-General's consent, a garnishee notice was taken out by the bailiff and addressed to the Director of Public Works and the Director of Financial Services as garnishees: Order 41 r. 4 of the Brunei High Court (Civil Procedure) Rules. **a**

A garnishee summons issued under O. 43 r. 2(1) was heard on 31 August 1989 before Registrar Rokiah Swed. A representative of the Attorney-General was present. On the same day a garnishee order was made (it should be noted that the order was wrongly dated 29 August 1989) in respect of B\$113,470.18, being B\$121,527.98 due to the judgment debtors less B\$8,057.80 in crown debts. The Registrar ordered that the "garnishees do forthwith pay to the Court on behalf of the judgment creditors" the sum in question. Sometime between the 1 and 28 September 1989 that sum of money was paid into the Court pursuant to the order. **b**

Immediately upon becoming aware of the payment into Court, the International Bank of Brunei (hereinafter referred to as the claimants) by their solicitors wrote to Acting Chief Registrar Kifrawi on 28 September 1989 claiming to be entitled to B\$92,587.74 of the garnished money as the assignee of the judgment debtors for the contract proceeds due to them by the government. The amount was stated to be B\$92,587.74 because the claimants mistakenly thought that this was the balance due to them. It was in fact B\$124,593.95. Subsequently however, they discovered their error and claimed B\$113,470.18, the amount garnished. The Acting Chief Registrar took out an interpleader summons on the application of himself in his capacity as bailiff directing the judgment creditors and the claimants to appear and state the nature and particulars of their respective claims to the money garnished. The interpleader summons was heard by the Acting Chief Registrar on 23 November 1989. He set aside the garnishee order and ordered the B\$113,470.18 to be paid to the claimants on the ground that the debt had been assigned to them under a legal assignment. **c**

The judgment creditors appealed against the Acting Chief Registrar's Order. Contrary to the contention advanced on behalf of the judgment creditors, Mr Commissioner Wong held that the Acting Chief Registrar correctly proceeded by way of interpleader summons, but allowed the appeal on the basis that there was no assignment and restored the Registrar's Garnishee Order. **d**

After the appeal the garnished money in Court was paid out to the judgment creditors. **e**

The claimants (the appellants) now appeal to this Court against the Commissioner's judgment that there was no assignment by the judgment debtors to the claimants. The judgment creditors (the respondents) cross-appeal on the ground that the interpleader proceedings before the Acting Chief Registrar were misconceived and that the Commissioner erred in holding the contrary. We find it both logical and convenient for us to deal with the cross appeal first. **f**

Interpleader Summons

Mrs. Appaduray, Counsel for the judgment creditors both in this Court and at the hearings before the Acting Chief Registrar and the Commissioner, submits that once the Registrar made the garnishee order, the Court was *functus officio* and that the Acting Chief Registrar whose jurisdiction was co-extensive with that of the Registrar, was not competent to set it aside and entertain interpleader proceedings. **g**

In our view, however, this contention is misconceived because for reasons which will be fully developed later the grant of relief in this case by way of interpleader did not require the setting aside of the garnishee order. Indeed, it was a result of that order that the bailiff came into possession of the money in respect of which his application was made. The **h**

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- a* situation would have been different, however, if the money had been paid out of Court to the judgment creditors. Then there would have been no basis for an interpleader summons, and the remedy of the claimants, having had no notice of and therefore not being present at the garnishee hearing, would have been to bring a fresh action to have their claim determined: *vide Burrell & Sons v. Read* [1894] L.T. 36.
- b* The Commissioner relied on this case as an authority to support the decision of the Acting Chief Registrar to set aside the garnishee order. As we have already said, however, we do not consider that it was necessary for him to do so. The garnishee and interpleader proceedings were distinctly separate procedures within the same action. So long as the money remained in Court, interpleader proceedings were available to determine the claim of a third party who was not present at and was unaware of the garnishee proceedings.
- c* Mrs. Appaduray placed reliance on *Behn Meyer & Co. (M) Sdn. Bhd. v. Agropharm Sdn. Bhd. & Ors.* [1988] 2 MLJ 636 and *Hock Hua Bank Bhd. v. Sahari Bin Murid* [1981] 1 MLJ 143. The first of these cases decided that, subject to certain exceptions, a garnishee order absolute cannot be altered, varied or set aside by the Court that made the order. This is because the Judge or registrar who made the order becomes *functus officio*. The decision of V.C. George J in that case followed that of the Federal Court of Malaysia in *Hock Hua Bank*. These cases however are not applicable in the circumstances of the present case where there was no need to set aside the garnishee order. With the greatest of respect to the Acting Chief Registrar, who was plainly misled by the confusing submissions made to him, he should not have set aside that order when granting relief to the claimants.
- d* We should observe in passing that V.C. George J was critical of the decisions in the old English cases *Marshall v. James* [1905] 1 Ch. 432 and *Moore v. Peachey* [1892] 66 LT 198.
- e* However, it is not necessary for us to decide whether this criticism is justified as we do not consider that either of these decisions has any direct relevance to the issues before us.
- Further, in support of her contention that the Acting Chief Registrar erred in bringing an interpleader summons when there was nothing to interplead because a final order had already been made, Mrs. Appaduray relies upon *Randall v. Lithgow* [1881] XII QBD 525 and
- f* *In Re Fairley* [1922] 2 Ch. 791.
- The facts in that former, which were described by the Divisional Court as “certainly peculiar” are succinctly set out in the headnote as follows:
- g* A claim on a fire policy having been made against an insurance company for unliquidated damages, the plaintiff, a judgment creditor of the assured for £127, duly served an *ex parte* garnishee order, under O. XLV r. 1, on the company, attaching all debts owing or accruing from them to the assured. The company did not appear to show cause against it, and the order was made absolute. An award on the claim was afterwards made of £248 due to the assured, who assigned it to trustees for his creditors. The plaintiff demanded payment under his garnishee order of £127 to be paid into Court, and an issue to be tried as to whether that sum was the property of the plaintiff or the trustees.
- h* On appeal - Held, that although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled the plaintiff to issue execution for £127, and that the interpleader order was wrong.
- That case can be distinguished from the present one because there the party bringing the summons was the garnishee, that is, the party who by his failure to attend had not opposed the garnishee order being made absolute and who was now unwilling to pay under that order,
- i* although it had never been set aside, and was seeking to have the issue of its liability tried again.

That is not the position in the present case where the applicant was the Court bailiff on whose application the interpleader summons was issued under rules of this Court in respect of monies on which there were rival claims, and which had come into his hands as a result of a particular form of execution, namely garnishment. **a**

We do not find *In Re Fairley* to be of any assistance as that relates to a totally different factual situation under the Bankruptcy Act 1914. **b**

This brings us now to the key question in the cross-appeal which is: what is the meaning to be given to the words in the Registrar's order: "garnishees do forthwith pay to the Court on behalf of the judgment creditors?" Mrs. Appaduray contends that the payment here was ordered to be made to the judgment creditors *via* the Court. The payment into Court in compliance with the Registrar's order was tantamount to payment to the judgment creditors direct, the Court in this case merely receiving the money as the judgment creditors' agent. The judgment creditors were therefore entitled to payment out by the Court as soon as the money was paid in and without further order. The Court was not in these circumstances as a stakeholder but the conduit pipe through which the money was paid to the judgment creditors. There was in the present case nothing to interplead. **c**

This argument, attractive though it is at first sight, ignores the fact that it was the bailiff who initiated the garnishee proceedings. He therefore had an interest to see that the money paid into Court was properly dealt with. The Registrar could not by a stroke of the pen deprive the bailiff of his power and duties as regards the money. The words used in the Registrar's order simply mean that the money should be paid to the Court, which would then hold the money on account of the judgment creditors. The Court, in the person of the bailiff, did not then surrender his power and duties and become the judgment creditors' alter ego. He still had the power and was under a duty to make such deductions as were necessary for Court expenses before paying the remainder to the judgment creditors. He was holding the money as a Court official and not as an agent of the judgment creditors. **d**

When the Acting Chief Registrar received letter of 28 September 1989 from the claimants' solicitors, there was only one proper course he could take as Chief Registrar and bailiff, and that was to take out an interpleader summons. He was holding the garnished money in Court. Confronted with rival claims to the money, it was not open to him to say: **e**

I am only the judgment creditors' agent and I shall do whatever they tell me to do.

In our judgment interpleader was the correct procedure and the cross appeal must be dismissed. We should add that it was not a ground of the cross appeal that the Acting Chief Registrar, having taken out the interpleader summons, wrongly exercised his discretion under O. 45 r. 8 to decide the claim in a summary manner. Accordingly that matter does not fall for our consideration. **f**

We now come to the appeal.

Whether there was an Assignment.

The Commissioner held that the letter dated 22 November 1983 from the judgment debtors to the Public Works Department did not create an assignment of the contract proceeds to the claimants by the judgment creditors, legal or equitable. **g**

It reads:

Date - 22 November 1983

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a The Director of Public Works
Public Work Department,
Bandar Seri Begawan,
Brunei

Dear Sir,

b **Re: Construction of Mosque at Kampong Sungai Kebun Brunei Bil (88) in Dev/Rela/22/80**

We hereby request you to make all payments for the abovementioned contract to the order of

The Island Development Bank Limited a/c Syarikat Hj Metussin dan Anak-anak.

This authorisation shall not be cancelled without the written consent from the said The Island Development Bank Limited.

c Please acknowledge receipt of this letter direct to the bank.

Thank you.

Your faithfully
(Hj Metussin b. Hj. Bakar)
Manager

d cc
Treasury Department
The Island Development Bank Limited

The title of the Island Development Bank Ltd was later changed to that of the claimant bank.

e It is common ground that, if there was an assignment, it was an equitable assignment, not a legal assignment.

The Commissioner examined all the surrounding circumstances and subsequent events that had taken place in deciding that the letter of the November 1983 could be construed as an assignment. We are satisfied that the only reasonable inference which could be drawn from the letter is that the judgment debtors clearly intended to assign to the claimants the money due under the contract.

f First, the letter embodies a request to the Director of Public Works that he make all payments to the order of the claimants. The reference to the judgment debtors account was simply to identify the matter in respect of which payment was made.

g The fact that the payment vouchers issued by the Department of Public Works state that the payee is the judgment debtors has no bearing either on the intention of the judgment debtor to assign the money to the claimants or of the claimants to accept the assignment. In any event we note that the significant documents, namely the actual cheques by which payment was made to the claimants and which were exhibited to the affidavit of the 14 November 1989 of Clarrisa Lee, the Administrative Assistant of the claimant bank, specify that the payee is the bank.

h They read either 'Pay to the order of Island Development Bank A/C Syarikat Awang Haji Metussin & Anak-anak' or 'Pay to the order of yourselves A/C Syarikat Haji Metussin dan Anak-anak'. We find ourselves unable to accept the contention which found favour with the Commissioner that these cheques were payable to the account of the judgment debtors. Secondly, the letter specifically stated that the authorisation shall not be cancelled without the written consent from (sic) The Island Development Bank Limited'.

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Consideration

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Next, we were concerned as to whether there was but past consideration for the assignment. The answer to that question is to be found in the uncontradicted evidence of Clarrisa Lee in para. 3 of her affidavit:

In or about November 1983, the judgment debtor had, amongst others, a contract to build the mosque at Sungai Kebun. The claimant agreed to finance this contract on condition that all contract proceeds received from the government were assigned and paid to the claimant directly.

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Clearly the consideration for the assignment was the claimant bank's agreement to finance the judgment debtors' contract with the government.

Waiver

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We note that although waiver formed part of Mrs Appaduray's submissions before the Commissioner he did not deal with it as such in his judgment, nor is it made a ground of appeal.

However, since Mrs. Appaduray addressed us on this question in detail and at length, and the Commissioner dealt with this issue on the basis that subsequent conduct of the parties showed that no assignment had been intended, we think it may be helpful if we state our opinion on the subject.

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It will be seen that the letter of assignment requested an acknowledgment by the Director of Public Works to be made to the claimants notifying them of receipt of the letter. The director did not acknowledge receipt but directed the treasury to pay the claimants all sums due under the Sungai Kebun construction contract to the judgment debtors.

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There were twenty-three payment vouchers covering a period from December 1983 to April 1987, from the treasury to the order of the claimant bank "A/C Syarikat Haji Metussin dan Anak-anak". An examination of the vouchers reveals that deductions amounting to approximately B\$745,000 were made from a total of about B\$2,100,000. Of those deductions B\$22,078 were referred to as 'business loans'. The amount payable to the claimants was the difference between the two larger sums.

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The government contract has not been exhibited but it seems fair to assume, for obvious reasons, that under it the government was entitled to make deductions for specified purposes and that it was only the balance which was due to the judgment debtors. This balance would thus be the subject of the assignment.

On 18 March 1986 the judgment debtors wrote to the Public Works Department requesting it to make direct payment to the judgment creditors. That letter was copied to the claimants, and there is no evidence that they raised any objection. The Public Works Department, however, did not act on the letter and no payments were made to the judgment creditors. Instead, progress payments less the deductions, continued to be made to the claimants from 1986 to 1987. The construction project was completed at the end of 1987, and there was at that time only one payment remaining due under the contract.

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On 26 November 1988 the judgment debtors sent a list of creditors and the amounts owed in respect of the Sungai Kebun construction project to the Public Works Department. The claimants appeared in that list, but there was no mention of any assignment. The last paragraph reads:

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- a* We desperately need to pay off the bank because if we could do so, the bank would definitely grant us financial/banking facilities etc.

- b* The Commissioner placed particular importance on this passage because in his view, read with the letter of 18 March 1986, it showed that the judgment debtors did not consider that there was any assignment. However, it would appear that the claimants on their part had no doubts about their position, for they wrote on 25 November, one day before the judgment debtors sent the list of creditors to the Public Works Department, stating that they had an assignment of the contract payments “directly to us” in accordance with the “letter of assignment dated 22 November 1983”. Following this, further deductions were made, leaving a balance of B\$113,470.18 payable. On 20 March 1989, the judgment debtors wrote to the Public Works Department asking them to effect direct payment to the claimants of B\$92,587.74 and on the 25 March 1989 the department acknowledged that direct payment of that sum to the claimants would be effected.

- c* In determining whether there was any waiver on the claimants’ part, it is necessary to consider the claimants’ state of mind and conduct. The mere fact that the judgment debtors might not, for example, by their list of creditors dated 26 November 1988, have treated the claimants as assignees is irrelevant. The question is whether the claimants had by their own conduct unequivocally indicated that they no longer insisted on their rights under the letter of assignment of 22 November 1983. In general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration; *Halsbury’s* Vol. 16, 4th Edn., para. 1471. Furthermore, mere acts of indulgence, particularly in commercial transactions will not amount to waiver: *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 WLR 761 at 764.

- f* On the facts, irrespective of what other parties had said or done, we are unable to find that any conduct on the part of the claimants could properly be construed as a waiver. We are of the opinion that the first sentence in the letter of assignment must be construed to mean that the judgment debtors were requesting the Director of Public Works to make to the bank all such payments as he was authorised under the contract to make to them. These would be progress payments less permitted deductions. Even if this were not so and the director had made unauthorised deductions from the progress payments, the failure of the claimants to object would at most amount to evidence that they might have waived these amounts, not the balance of the sum assigned.

- g* Accordingly the appeal is allowed. Except in so far as he upheld the Registrar’s garnishee order the Commissioner’s judgment is set aside. We order that the judgment creditors do pay the sum of B\$113,470.18 to the claimant bank.

- h* The claimants will have the costs of the interpleader hearing, the appeal before the Commissioner, their appeal to this Court, as well as the costs on the cross-appeal.

Also found at [1991] 2 CLJ 1236

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